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No. 89-1232

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

THE STATE OF COLORADO,

Petitioner,

vs.

CHARLES CLEBURN,

Respondent.

BRIEF OF THE COLORADO ATTORNEY GENERAL AND THE TWENTY-ONE STATES THAT APPEAR ON THE INSIDE COVER AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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ISSUES PRESENTED

1. Whether a citizen-police encounter can ever amount to "custody" requiring *Miranda* warnings if it is not so intrusive as to elevate an investigatory detention to an arrest?

2. Whether the same, or a different, analysis applies to voluntariness determinations concerning statements and consents to search?

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Pursuant to Rule 37 of the rules of this Court, the Colorado Attorney General and the amici states by their Attorneys General respectfully submit this Brief as *amici curiae* in support of the petitioner here.

STATEMENT OF THE CASE

The respondent here was charged with felony menacing in Fremont County, Colorado. On interlocutory appeal by the local district attorney, the Colorado Supreme Court upheld the suppression of some statements and a rifle respondent gave to

local sheriff's officers.

A deputy sheriff suspected an acquaintance, the respondent, of having menaced another individual with a gun. Consequently, he and a local posseman went to respondent's house and told him they needed to talk to him. Respondent invited them inside. The men talked in "sort of a 'good ol' boy scenario" in the kitchen in the presence of respondent's wife. The deputy asked respondent whether he had earlier that day had a "run-in" with another man, to which he answered he had. The deputy informed him that the victim claimed a weapon had been involved and asked a series of questions about what types of weapons respondent possessed. Respondent went to his bedroom to get a gun. The deputy followed and asked him about other guns as well.

The deputy eventually asked respondent whether he had something "like a .30-30"; respondent answered he did. Respondent produced the rifle and gave it to the deputy, after having been informed he need neither show it or give it up. The deputy took the rifle to his car, and, after some reflection, returned to place respondent under arrest.

The Colorado Supreme Court held respondent's statements inadmissible, since, in its view, he was subjected to custodial interrogation without having been advised of his *Miranda* rights. Specifically, it found that a custodial setting exists whenever a reasonable person would believe he was not free to leave the presence of the police; and, that respondent was placed in that position because: 1) two armed officers were present in his house for the purpose of talking to him about a crime; 2) the deputy initiated the conversation with respondent; 3) the deputy intended to obtain evidence against him; 4) the questioning took place over a 20-30 minute period of time; and, 5) the prior relationship between the deputy and

respondent made the questioning subtly coercive. *People v. Cleburn*, 782 P.2d 784, 786-87 (Colo. 1989).

The Colorado Supreme Court also upheld the lower court's finding that the state failed to prove by clear and convincing evidence that respondent voluntarily consented to a search for and the seizure of the rifle. In support of its ruling, the Court cited, among other things, the subtly coercive effect arising from the relationship between the deputy and respondent. *Id.* at 786-87.

INTEREST OF AMICI CURIAE

The amici here have a substantial interest in seeing this holding reviewed because they all have law enforcement responsibilities within their respective jurisdictions. The holding of the Colorado court purports to construe the fourth, fifth, and fourteenth amendments to the United States Constitution, all of which are binding on the amici.

REASONS FOR GRANTING THE WRIT

I.

Pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), law enforcement officials may not subject citizens to custodial interrogation without having first advised them of certain rights protective of their fifth amendment privilege against self-incrimination. The *Miranda* Court noted, "By custodial interrogation, we mean questioning initiated by law enforcement officers after the person has been taken into custody or otherwise deprived of his freedom in any significant way." *Id.* at 444.

This Court had little trouble finding *Miranda* custody

present whenever police place a suspect under arrest for all practical purposes. *Orozco v. Texas*, 394 U.S. 324 (1969). However, it struggled for some time to determine whether any contact with police that was not intrusive enough to amount to an arrest could constitute custody for purposes of *Miranda*. In *Oregon v. Mathiason*, 429 U.S. 492 (1977) (suspect voluntarily appeared at police station for questioning) and *Beckwith v. United States*, 425 U.S. 341 (1976) (suspect who was the focus of IRS investigation interviewed in home in which he occasionally stayed), for example, this Court devoted its attention towards explaining why certain circumstances did not produce a custodial setting, rather than explaining what circumstances would.

The issue hinged on how broadly to apply *Miranda's* "deprived of ... freedom in any significant way" language. At least one justice believed it applied whenever a reasonable person in the suspect's position would have believed he was not free to leave the presence of the police. *Mathiason*, *supra* at 496 (Marshall, J., dissenting). The "not free to leave" standard would have made *Miranda* applicable whenever a person was subjected to a fourth amendment "seizure", *see United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J.)(seizure test); *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975, 1979 (1988) (same), regardless of the type of "seizure" (*i.e.*, investigatory detention or arrest, *see Terry v. Ohio*, 392 U.S. 1 (1968)) involved.

In 1983 and 1984, this Court decided a set of cases which, on their face, appeared to definitively answer the question. In *California v. Beheler* 463 U.S. 1121, 1125 (1983), this Court stated (with little discussion) that "the ultimate test {was} simply whether there {was} . . . 'restraint on freedom of movement' of the degree associated with a formal arrest." *See*

also Minnesota v. Murphy, 465 U.S. 420,430-31 (1984). Subsequently, the Court, in *Berkemer v. McCarty*, 468 U.S. 420 (1984), explained that the *Miranda* langua[illegible] would not be accorded talismanic power in and of itself, but would be applied only to address "those types of situations in which the concerns that powered the {*Miranda*} decision {were} implicated." *Id.* at 437. Those concerns, the Court said, were not implicated by brief *Terry*-type investigative detentions, but only where a person "was subjected to restraints comparable to to those associated with a formal arrest." *Id.* at 439-41. Since a person who has been subjected to restraints comparable to those associated with a formal arrest has, in fact, been arrested, regardless of any formal announcement, *see* 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, sec. 5.1(a) at 44 (1990 pocketpart), *Berkemer* equates *Miranda* "custody" with "arrest."

The *Berkemer* case involved questioning incidental to a routine traffic stop. Near the conclusion of its opinion there, this Court noted that "adherence to {the functional arrest} doctrine . . . will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody." *Id.* at 441. This has proven to be an understatement, at best.

Despite *Beheler* and *Berkemer*, a number of lower courts measure *Miranda* custody outside the context of traffic stops in terms of the "free to leave", "seizure" test, rather than in terms of a functional arrest test. *E.g. Cleburn*, 782 P.2d at 786-87; *State v. Fiocchi*, 17 Conn App. 326, 553 A.2d 181, 186-87 (Conn. App.) *petition for certification for appeal denied*, 210 Conn. 812, 556 A.2d 611 (1989); *Ruffin v. United States*, 524 A.2d 685 (D.C. App. 1987), *cert. denied* 108 S.Ct. 2827 (1988); *People v. Bernasco*, 185 Ill. App. 3d 480, 133 Ill. Dec. 563, 541

N.E.2d 774, 780-81 (1989); *Commonwealth v. Bryant*, 390 Mass. 729, 459 N.E.2d 792, 797-801 (1984); *State v. Allen*, 322 N.C. 176, 367 S.E. 2d 626 (1988); *State v. Hall*, 353 N.W.2d 37, 40-41 (S.D. 1984); *State v. Brunell*, 554 A.2d 242, 244 (Vt. 1988). Others hold that there are some "seizures" short of arrest which require compliance with *Miranda*. *E.g.*, *State v. Hall*, 537 So. 2d 171, 172 (Fla. App. 1989) (although "a temporary detention upon founded suspicion of criminal activity does not always require *Miranda* warnings," a more restrictive detention with more coercive circumstances than *Berkemer's*, establishes "custody"); *State, City of Spring Lake Park v. Seekon*, 392 N.W. 2d 624 (Minn. App. 1986) (*Miranda* warnings required in connection with "felony probable cause stops"); *State v. Connery*, 441 N.W. 2d 651, 654-55 (N.D. 1989) (finding "custody" where officer escalated detention beyond mere general investigation by drawing weapon to restrain individual). *See Blake v. State*, 763 P.2d 511, 515 (Alaska App. 1988) ("{A}n investigatory stop for purposes of the fourth amendment does not necessarily trigger a right to *Miranda* warnings."). Others still, however, specifically reject both the "seizure" test and the notion that any permissible investigatory detention could require *Miranda* warnings; these courts adhere strictly to the *Berkemer* functional arrest test. *E.g.*, *United States v. Streifel*, 781 F.2d 953, 960-61 (1st Cir. 1986); *State v. Toro*, 229 N.J. Super. 215, 551 A.2d 170, 172-73 (1988).

Whatever the test used, the lower courts have not employed a consistent approach in analyzing "custody." Some courts emphasize factors pertaining to the suspect's freedom of movement and the atmosphere surrounding police questioning. *E.g.*, *Streifel*, 781 F.2d at 961 n. 13. Others rely almost exclusively on the officers' and suspects' subjective intents or beliefs. *E.g.*, *Curtis v. State*, 754 S.W.2d 460, 463 (Tex. App.

1989). Many combine these approaches in some manner, *e.g.*, *McDowell v. Solem*, 447 N.W. 2d 646, 649 (S.D. 1989), and consider, among other things, whether the suspect was the focus of police investigation, *e.g.*, *McDowell*, 447 N.W. 2d at 649; *Jenkins v. State*, 533 So.2d 297, 300 (Fla. App. 1988) *petition for review denied* 542 So. 2d 1334 (Fla. 1989); *Commonwealth v. Smith*, 382 Pa. Super. 288, 555 A.2d 185, 190 (1989); *State v. Watkins*, 526 So. 2d 357, 360 (La. App. 1988); *Bosworth v. Commonwealth*, 7 Va. App. 567, 375 S.E. 2d 756, 759 (1989), whether the police had probable cause to arrest the suspect, *e.g.*, *Watkins*, 526 So. 2d at 360; 496 A.2d at 639; *McDowell*, 447 N.W. 2d at 649; *Bosworth*, 375 S.E. 2d at 759; *cf. Bernasco*, 541 N.E. 2d at 780 (extent of knowledge possessed by police), whether the police initiated contact with the suspect, *e.g.*, *Cleburn*, 782 P.2d at 786-87, and, the purpose of the police in questioning the suspect, *Cleburn*, 782 P.2d at 786-87; *Bernasco*, 541 N.E. 2d at 780; *McDowell*, 447 N.W. 2d at 649. [1]

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[1] There is no uniformity regarding the factors the lower courts consider. *See, e.g.*, *Streifel*, 781 F. 2d at 961 n. 13 (number of officers present; degree of physical restraint on accused; location, duration, and character of interview); *State v. Finch*, 518 So. 2d 864, 868-69 (Ala. App. 1987) (familiarity or neutrality of surroundings, number of police present, degree of physical restraint, duration and character of interrogation, how the suspect arrived at the scene of questioning, whether suspect is confronted with evidence of guilt, and degree of pressure applied to detain suspects); *People v. Thiret*, 685 P.2d 193, 203 (Colo. 1984) (time, place, and purpose of encounter; persons present during the interrogation; the words spoken by the officer to the suspect; the officer's tone of voice and

The problem lies with this Court's failure to explain in

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general demeanor; the length and mood of the interrogation; whether any limitation of movement or other form of restraint was placed on the suspect during questioning; the officer's response to any questions asked by the suspect; whether directives were given to the suspect during the interrogation; and, the suspect's verbal or nonverbal response to such directives); *Bernasco*, 541 N.E. 2d at 780-81 (location, time, length, mood, and motive of interview, including the extent of knowledge possessed by the police; the number of police present; the presence or absence of family or friends of the accused; the manner of accused's arrival at the place of interrogation; whether the accused voluntarily assisted in the investigation; whether the suspect was permitted to walk within and from the location of the interrogation unaccompanied by police; and the age, intelligence, and mental makeup of the accused); *People v. Arcese*, 148 App. Div. 2d 460, 538 N.Y.S. 2d 614, 615 *petition for review denied*, 74 N.Y.2d 661, 543 N.Y.S. 2d 403, 541 N.E. 2d 432 (1989) (amount of time spent with police; whether freedom of action restricted in any significant manner; location of and atmosphere under which accused was questioned; whether accused was apprised of his rights; and whether police questioning was investigatory or accusatory in nature); *McDowell*, 447 N.W. 2d at 649 (probable cause to arrest; focus of investigation; subjective perception of suspect; nature of interrogator; nature of suspect; time and place of interrogation; nature of interrogation; purpose of interrogation); *Curtis*, 754 S.W. 2d at 463 (whether the police had probable cause to arrest; whether the suspect was the focus of police investigation; the subjective intent of the police; and, the subjective belief of the suspect).

Berkemer what a functional arrest was other than to contrast it with the (repeatedly emphasized) brief and nonintrusive character of *Terry* "stops". *Berkemer*, 468 U.S. at at 439-42. Since *Berkemer*, this and other courts have acknowledged that investigatory detentions may be permissibly prolonged, *e.g.*, *United States v. Sharpe*, 470 U.S. 675 (1985) (30-40 minutes), and, in some circumstances, accompanied by the showing or even application of force, *e.g.*, *United States v. Hensley*, 469 U.S. 221, 224, 235 (1985) (drawn revolver); *United States v. Hastomorir*, 881 F.2d 1551, 1556-57 (11th Cir. 1989) (handcuffs); *see generally* 3 W. LaFave, *supra*, secs. 9.2(d) & (f) (1987 & 1990 Supp.), without becoming an arrest. Many lower courts, unsure of exactly how *Berkemer* would apply to these detentions, have opted to articulate *Miranda* custody in terms of the more general "seizure" standard; and, to consider prior police knowledge and motivation in determining the character of police-citizen contacts. *Cf. Jenkins*, 533 So. 2d at 300 (*Miranda* warnings required where officer created relaxed and informal setting calculated to delude prime suspect of the purpose for questioning him).

In the process, these courts have failed to recognize that: 1) absent intimidating circumstances, police questioning does not, in and of itself, amount to any type of "seizure," *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *Royer*, 460 U.S. at 497-98, 501; 2) subjective factors regarding whether the suspect was the focus of investigation, whether the police had probable cause to arrest the suspect, for what purpose the police initiated contact with the suspect, and the undisclosed intent of the officer, logically have nothing to do with the objective determination of what a reasonable person in the suspect's position would believe, *e.g.*, *United States v. Bengivenga*, 845 F.2d 593, 596-97 (5th Cir.) *cert. denied* 109 S.Ct. 306 (1988)

(citing, among others, *Berkemer*, *supra*; *Beckwith*, *supra*; *Murphy*, *supra*); *Allen*, 367 S.E. 2d at 632; and, 3) *Miranda* was designed to protect suspects from inherently coercive, police-dominated settings which work to undermine the individual's will to resist and compel him to speak where he would otherwise not freely do so -- settings laced with insinuations that questioning will continue until confessions are obtained. *Miranda*, 384 U.S. at 467-68; *Murphy*, 465 U.S. at 433; *Fiocchi*, 553 A. 2d at 186.

Perhaps nowhere is the confusion regarding *Miranda* custody more evident than in the Colorado Supreme Court's *Cleburn* opinion. First, the Colorado court inexplicably mixed interrogation (questioning designed to obtain incriminating evidence, *see Rhode Island v. Innis*, 446 U.S. 291 (1980) up with custody. *see Murphy*, *supra* at 431; *United States v. Phillips*, 812 F.2d 1355, 1360-61 (11th Cir. 1987); *United States v. Hall*, 421 F.2d 540, 544 (2d Cir. 1969) *cert. denied* 397 U.S. 990 (1970); *Fiocchi*, 553 A. 2d at 187. Next, it improperly applied subjective factors regarding police knowledge and motive to the objective, reasonable person standard which governs here. *Berkemer*, 468 U.S. at 442; *Bengivenga*, 845 F. 2d at 596-97; *Phillips*, 812 F.2d at 1361-62. Third, it unduly distorted the relative importance of the presence of armed officers, *see United States v. Chalan*, 812 F.2d 1302, 1305-07 (10th Cir. 1987); *cf. State v. Craney*, 381 A.2d 630, 632 (Me. 1978) (pyschological pressures emanating from officers' authority alone is insufficient to create an inherently coercive environment), police initiation of conversation, *e.g. Terry*, 392 U.S. at 32 (Harlan, J., concurring: a police officer has the same liberty possessed by every other citizen to address questions to other people); *Royer*, 460 U.S. at 497-98, 501 (same), and length of interrogation. *See e.g.*, *Chalan*, *supra* at 1306-07 (90

minutes); *State v. Carpentier*, 562 A.2d 181, 182-83 (N.H. 1989) (3 hours); *People v. Stebbins*, 543 N.Y.S. 2d 598, 599 (N.Y. App. 1989) (2 hours); *United States v. Hall*, 421 F.2d at 543 (17 minutes). Fourth, it erroneously attributed an inherently coercive effect to respondent's mere acquaintanceship with the deputy. *See Colorado v. Connelly*, 479 U.S. 157, 170 (1986) ("Fifth Amendment protections are not concerned with moral or pyschological pressures to confess emanating from sources other than official coercion"); *see also Mitchell v. State*, 541 N.E. 2d 265, 269 (Ind. 1989) (suspect's close personal relationships with officers made him less susceptible to official pressure); *Commonwealth v. Willman*, 434 Pa. 489, 255 A.2d 534, 536 (1969) ("by being friendly, the police alleviated the danger of intimidating appellant into making a confession").

All these matters became particularly significant when the court felt compelled to measure *Miranda* custody in terms of a test significantly more favorable to the accused than that which this Court applied in *Beheler* and *Berkemer*. *See Streifel*, 781 F. 2d at 960-61. The application of the *Berkemer* functional arrest test would not have allowed the Colorado court to wholly ignore respondent's having been questioned in his home, in the presence of his wife, by an individual he knew, without any restraint on his physical movement, and without any deception or application of physical force. "Questioning an individual in his own home, without more, is not sufficient to conclude that the interrogation was custodial. . . . There were, in this case, no additional significant circumstances upon which to predicate a finding of custodial interrogation". *People v. Benz*, 136 App. Div. 2d 958, 524 N.Y.S. 2d 942, 943, *petition for review denied*, 72 N.Y. 2d 856, 532 N.Y.S. 2d 506, 528 N.E.2d 896 (1988). *See also, United States v. Hall*, 421 F.2d at 544 (more than polite interrogation is required to established

custody).[2]

In 1986 then Chief Justice Burger remarked on "the acute need" for further clarification of the *Miranda* custody standard. *Maine v. Thibodeau*, 475 U.S. 1144, 1145 (1986) (Burger, C.J., dissenting from denial of certiorari). As this Colorado case demonstrates, that need has only been exacerbated, not subsided, since that time. It has been over 23 years since *Miranda* was decided, and 5 years since *Berkemer* was decided. Yet, "the precise contours of applicable constitutional standards remain less than clear." *Streifel*, 781 F.2d at 961 n. 14.

Miranda continues "to exact heavy costs on the public's interest in protection from crime." Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda"*, 54 U.Chi. L. Rev. 938, 948-49 (1987). The states, in particular, did not willingly assume those costs;

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[2] *See also, e.g., Beckwith*, 425 U.S. at 342-48 (2 IRS agents interviewed suspect in a home in which he occasionally stayed); *United States v. Hall*, 421 F.2d at 542-46 (3 FBI agents interviewed suspect in his own apartment); *Phillips*, 812 F.2d at 1360-62 (suspect questioned in his shop by two officers, one of whom suspect saw on a daily basis); *United States v. Bush*, 820 F.2d 858, 859, 862 (7th Cir. 1987) (FBI agent interviewed suspect in his own home); *Erhart v. State*, 656 P.2d 1199, 1200 n. 1 (Alaska App. 1982) (suspect interviewed in his own home and in the presence of his family); *State v. Davis*, 446 N.W. 2d 785, 786 (Iowa 1989) (suspect interrogated in "most pleasant" atmosphere in his own home); *State v. Coburn*, 221 N.J. Super. 586, 535 A.2d 531, 536-37 (1987) *cert. denied* 110 N.J. 300, 540 A.2d 1281 (1988) (interrogation in home of suspect's ex-wife, in the presence of suspect's sister and the sister's friend).

but had those costs imposed upon them as a result of this Court's interpretation of the federal constitution. As *Cleburn* and other similar cases show, courts and law enforcement officials are struggling to predict the point at which this Court will require the payment of *Miranda's* societal costs. Meanwhile, *Miranda* has been turned topsy-turvy: probative evidence is excluded now even where police act towards persons in such a considerate manner that they dispel any notion of coercion on their part. *See also Jenkins*, 533 So. 2d at 300 (*Miranda* warnings required where police created a relaxed and informal atmosphere of interrogation).

Definitive guidance is needed regarding what type of "seizure" is necessary to trigger *Miranda* protections, and how to determine whether the appropriate level of seizure has been effectuated. When states exclude probative evidence based on the type of reasoning employed here, the public justifiably perceives *Miranda* as promoting a sense of gamesmanship at the expense of respect for, and the protection of, the law. *Cf.* Caplan, *Questioning Miranda*, 38 Vand. L. Rev. 1417, 1419, 1450, 1457 (1985). This case provides the Court with an opportune vehicle to re-harmonize *Miranda* custody with the purposes it was originally meant to achieve.

II.

Since *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), it has been clear that voluntariness of consent to search determinations closely parallel voluntariness of statement determinations. Significant differences have developed, however, regarding the analysis applied for determining fourteenth amendment voluntariness in each of the two instances.

The Colorado court held that one of the factors

contributing to the involuntariness of respondent's consent to search was the coercive effect of the relationship between respondent and the deputy. In *Connelly*, 479 U.S. at 167, this Court held that a person's state of mind was irrelevant to a voluntariness of statement inquiry unless and until the police engaged in some type of coercive activity. The Court refused to "expand {the} line of 'voluntariness cases' into a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision." *Id.* at 165-66. Whatever pyschological pressures respondent may have felt as a result of his acquaintanceship with the deputy, they could have had no bearing on the voluntariness inquiry in the absence of "police overreaching," "coercive police conduct," "police wrongdoing," or "objectively unacceptable police behavior." *Id.* at 163-65; *United States v. Wolf*, 813 F.2d 970, 975-76 n. 16 (9th Cir. 1987). *Cf. McCall v. Dutton*, 863 F.2d 454, 461 (6th Cir. 1988) *cert denied* 109 S.Ct. 1744 (1989) ("if {a} confession was the product of {one's} own incoherent mind, rather than a product of police coercion, the confession should not be suppressed"). There never was, nor could there be, a claim of police overreaching in this case--the deputy was at all times straightforward with respondent, and never intimated that he would help respondent in exchange for his cooperation.

A second, and perhaps even more glaring, inconsistency in the voluntariness inquiries is evident here. Since *Lego v. Twomey*, 404 U.S. 477 (1972), the voluntariness of statements has had to be shown by a preponderance of the evidence. Many lower courts have adopted that same burden of proof with respect to the voluntariness of consents to search. *E.g., People v. Bruce*, 185 Ill. App. 356, 133 Ill. Dec. 497, 541 N.E.2d

708, 715 (1989); *State v. Lamp*, 322 N.W. 2d 48, 53 (Iowa 1982); *State v. Ruden*, 245 Kan. 95, 774 P.2d 972, 979 (1989); *State v. McLain*, 367 A.2d 213, 217 (Me. 1976); *Humphrey v. State*, 39 Md. App. 484, 386 A.2d 1238, 1242 (1978); *State v. Peterson*, 525 S.W. 2d 599, 608 (Mo. App. 1975); *Wilde v. State*, 706 P.2d 251, 256 (Wyo. 1985).

Like Colorado, however, many other courts believe that the federal constitution requires that voluntariness of consents to search be shown by clear and convincing evidence. *E.g*, *United States v. Andrews*, 746 F.2d 247, 249 (5th Cir. 1984) *cert. denied* 471 U.S. 1021 (1985); *Lott v. State*, 456 So. 2d 857, 859 (Ala. Ct. App. 1984); *Restrepo v. State*, 438 So. 2d 76, 77 (Fla. App. 1983); *State v. Harwood*, 94 Idaho 615, 495 P.2d 160, 163 (1972); *State v. Cantanese*, 493 So. 2d 725, 728 (La. App. 1986); *State v. Valencia-Olaya*, 105 N.M. 690, 736 P.2d 495, 499 (1987); *State v. Phillips*, 25 N.C. App. 5, 212 S.E. 2d 172, 175 (1975); *Coon v. State*, 587 P.2d 1373, 1374 (Okla. Ct. App. 1978); *State v. Glenn*, 83 Or. App. 650, 732 P.2d 946, 948 (1987); *Linnell v. State*, 767 S.W.2d 925, 927 (Tex. App. 1989); *State v. Mathe*, 35 Wash. App. 572, 668 P.2d 599, 602 (1983) *aff'd* 102 Wash. 2d 859, 688 P.2d 859 (1984). *See Huls v. State*, 27 Ark. App. 242, 770 S.W. 2d 160, 164 (1989) (clear and positive evidence).

Recently, this Court refused to require such an exacting standard even when establishing the voluntary, knowing, and intelligent waiver of fifth amendment *Miranda* rights. *Connelly*, 479 U.S. at 168-69. In *Connelly*, the Court reiterated the *Lego* policy considerations: the absence of evidence indicating that federal rights suffer from the application of a preponderance standard; and, the improbability that escalating the state's burden of proof would sufficiently deter lawless police conduct so as to outweigh the public's interest in placing probative

evidence before juries.

No special policy considerations distinguish the *Lego-Connelly* situations from the context of determining the voluntariness of consents to search. The various jurisdictions should no longer labor under the impression that a different burden applies. Its harmful effect is plainly visible in a case where, as here, individuals have been informed of a right to refuse consent but courts nonetheless refrain from finding valid consent because of a particular caution with which they apply the clear and convincing evidence standard.

Whether the same, similar, or different analyses apply to determine admissibility of evidence supposedly taken in derogation of the fourth, fifth, and fourteenth amendments, is a matter of grave importance to each of the amici.

CONCLUSION

For the foregoing reasons the *amici curiae* respectfully request that this Court issue a writ of certiorari to review the Colorado Supreme Court decision in *People v. Cleburn*.

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